U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date: June 18, 1999

Case No.: 1996-INA-0232

In the Matter of:

POLONIA RESTAURANT,
Employer

On Behalf Of:

JADWIGA WARZAWA,
Alien

Certifying Officer: Delores Dehaan, Region II

Appearance: Mr. Paul W. Janaszek
For the Employer/Alien

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 9, 1994, Polonia Restaurant ("Employer") filed an application for labor certification to enable Jadwiga Warszawa ("Alien") to fill the position of Cook, Polish (AF 7-8). The job duties for the position are:

> Prepares, season and cook soups, meats, vegetables according to the traditional recipes of Polish cuisine. Prepares specialty entrees, such as cold Borsch; Stuffed Cabbage, Blintzes. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Uses a variety of kitchen utensil, such as blenders, mixers, grinders, slicers and tenderizers. Observes and tests foods being cooked, by tasting, smelling, and piercing with fork.

The requirements for the position are eight years of grade school and two years of experience in the job offered.

The CO issued a Notice of Findings on September 29, 1995 (AF 28-30), proposing to deny certification on the grounds that the Employer failed to establish that the job opportunity represents permanent, full-time employment pursuant to § 656.3. In addition, the CO instructed the Employer to submit the original, full-page tearsheets for each date that it advertised the job opportunity.

Accordingly, the Employer was notified that it had until November 3, 1995, to rebut the findings or to cure the defects noted. Subsequently, the Employer requested an extension of its rebuttal deadline (AF 31). This request was granted and the Employer was given until November 2, 1995, to rebut the CO's findings.

In its rebuttal, dated December 2, 1995 (AF 33-120), the Employer contended that Polish-cuisine foods constitute about 70% of its sales. Invoices from October 1994 were submitted to support this contention. The Employer further asserted that, without another full-time Polish cook, it will not be able to satisfy its customers. In addition, the Employer listed the Polish cuisine served at its restaurant. The Employer explained that it currently employs six individuals, four of whom were hired through the U.S. labor market. Finally, the Employer submitted its

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Federal Income Tax Returns for 1992, 1993, and 1994, along with its Quarterly Federal Tax Return/Social Security Payroll Records for 1993, 1994, and 1995.

The CO issued the Final Determination on December 12, 1995 (AF 121-123), denying certification because the Employer failed to establish that the job opportunity represents permanent, full-time employment pursuant to § 656.3.

Discussion

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collector's International, Ltd.* 89-INA-133 (Dec. 14, 1989).

In this case, the CO questioned whether the job opportunity represents permanent, full-time employment pursuant to § 656.3 (AF 28-29). As such, the CO asked the Employer to supply information regarding the job opportunity. Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the total annual dollar volume of the company for the last three years; (2) the number and titles of employees each year for the last three years and the number and titles of current employees. How many of these employees were hired through the U.S. labor market; (3) is the Alien required to prepare other foods or perform other duties. Are the other three Polish-style cooks required to prepare other foods or perform other duties; and, (4) who prepares the non-Polish food dishes. The CO also instructed the Employer to provide documentation such as tax returns, Social Security payroll records, and financial statements.

In its rebuttal, the Employer asserted that "about 70%" of the Company's total gross revenue is derived from Polish cuisine (AF 118). To support this contention, the Employer submitted copies of itemized invoices (AF 36-100). The Employer also listed the Polish cuisine served at its restaurant. The Employer stated that it currently has six employees: three Polish cooks, one American cook, one helper, and one manager. He stated that four of these individuals were hired through the U.S. labor market (AF 116). The Employer explained that the individual filling this position will only be required to prepare Polish-style dishes. Finally, the Employer submitted its tax returns from 1992, 1993, and 1994 indicating that its total dollar volume was $1,283,119, $1,338,825, and $1,458,839, respectively (AF 104-114).

In the Final Determination, the CO found that the Employer's quarterly and annual federal tax returns "appear to support his ability to guarantee permanent and full-time employment/wages for four or more cooks; however, the evidence does not support the requirement for a full-time 'Polish-style cook.'" (AF 122).

This finding by the CO is nothing more than a finding that while the Employer's business can support another cook, it does not need a "Polish-style cook," but that an "American-style

cook" would suffice. As such, the CO's denial of labor certification cannot be affirmed on the basis of such an arbitrary determination.

Accordingly, the CO's denial of labor certification is hereby VACATED and REVERSED.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.